(2)

92-2056

No.

In The

Supreme Court of the United States

October Term, 1993

CALVIN J. HALL,

Petitioner,

vs.

WILLIAM HARLAN, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This appeal addressed the fundamental right of District Courts to sanction the Attorneys allowed to practice before them for unethical and impermissible conduct. The issues presented for review were:

(a) The ability of the District Courts, under their inherent powers, to sanction Attorneys for violations of ethical rules, Rules of Civil Procedure, and Rules of Evidence;

(b) Whether or not the Petitioner, Mr. Hall, Attorney for the Defendant in the District Court proceedings, was provided adequate notice that sanctions were being considered, and received an opportunity to be heard, thus satisfying the requirements of due process;

(c) Whether or not the District Court was required to find Mr. Hall had conducted the litigation in bad faith, and if so, does the Order in question make such a finding.

The sanctions came in the form of two separate $2,500 sanctions for violations of Rules 3.4(a) and (f) of the Model Rules of Professional Conduct.

Petitioner attempted to dissuade two individuals with relevant information from talking to, much less cooperating with, Respondents' counsel. It is these specific actions for which Petitioner was sanctioned. Uncontroverted evidence was submitted that Petitioner had contacted numerous subsequent treating physicians of the injured infant without presenting a medical authorization, and without the knowledge or consent of the Respondents or their Attorney.

The Petitioner was required by the District Court, as part of its

inherent ability to resolve discovery disputes, to turn over all notes and documentation generated during improper *ex parte* contacts between Petitioner and the Respondent/patient's subsequent treating physicians that took place since July 1, 1991, or the effective date of the Amendments to Rule 35 of the Arkansas Rules of Civil Procedure and Rule 503 of the Uniform Rules of Evidence. The District Court, with the Eighth Circuit Court of Appeals, affirming, sanctioned the Petitioner for conduct that was termed "impermissible and unethical." Both lower Courts held that these sanctions were justified regardless of which interpretation of Rule 503 one deems proper. The Eighth Circuit held that the sanctions were "measured and appropriate" under the circumstances. There was no abuse of discretion.

The Eighth Circuit furthermore found that even if one assumes a finding of bad faith is unquestionably required, the District Court's Order implies such a finding, and is proper in all respects. (Appendix at 9A). The Eighth Circuit found the District Court had to act to prevent the erosion of the integrity of these proceedings, and that the State disciplinary body to which the Petitioner claimed this matter should have been referred could not have repaired the damage caused by Petitioner's "attempt to restrict the flow of relevant information and discovery by planting implied threats into the minds of potential witnesses." (Appendix at 10A).

The lower Court held that the Petitioner had been afforded due process of law. A Motion pursuing the severest of sanctions possible, *i.e.*, striking of the Defendant's Answer, Attorneys' fees, costs, and "any other relief deemed necessary and equitable by the [District] Court" was filed on December 6, 1991. The Memorandum Opinion was not issued by the District Court until January 29, 1992. The Petitioner "had every opportunity and perhaps an ethical duty, to present [any evidence to refute the depositions and the Affidavits filed in support of said Motion] in

his client's defense" and chose not to do so. (Appendix at 12A).

The Petition filed by the Petitioner does not challenge the Eighth Circuit's interpretation of Rule 503(d)(3) of the Arkansas Rules of Evidence and Arkansas Rules of Civil Procedure 35, as applicable to federal diversity causes of action under Federal Rule of Evidence 501. Accordingly, said interpretation will not be addressed in this Brief in Opposition.

SUMMARY OF THE ARGUMENT

Petitioner's violation of the ethical rules of conduct, and the Amendments to the applicable Rules of Civil Procedure and Rules of Evidence, were intentional. The District Court has the inherent ability and authority to sanction those members practicing before it for such violations.

Respondents filed a Motion seeking sanctions against the Petitioner by way of striking his client's Answer, payment of Attorneys' fees and costs, and forcing him to turn over a list of the individuals who had been contacted in an improper manner. Numerous Affidavits and excerpts from depositions were submitted which supported the Respondents' position. During the 76 days between the filing of the Respondents' Motion and the District Court's Order, Petitioner never submitted an Affidavit or an excerpt from a deposition supporting his position, nor did he request additional time to supplement the record or request that the Court conduct an evidentiary hearing. After said Order was entered, he did not file a Motion for Reconsideration.

The District Court found Petitioner guilty of "unethical and impermissible" conduct in very blunt terms. The Court also impliedly found that Mr. Hall was guilty of bad faith in the manner in which he conducted the litigation. The Eighth Circuit agreed with both findings, specifically that the Petitioner conducted the litigation in bad faith.

Contrary to the arguments advanced by the Petitioner in his Petition, Judge Beam of the Eight Circuit supported the imposition of sanctions for a violation of the Ethical Rules of Conduct. Accordingly, any discussion of Rule 503 is, basically, irrelevant.

REASONS FOR DENYING THE WRIT

I.

OVERVIEW OF PERTINENT FACTS AND DISTRICT COURT FINDINGS

The Petitioner has stated in his Brief that: (a) He was not put on notice that the Respondents were seeking sanctions in the District Court; and (b) there was no finding of bad faith by the District Court. Both of these positions are erroneous, and can be easily dispelled by a review of the applicable facts.

A. The Relief Requested Clearly Put The Petitioner on Notice That The Respondents Were Seeking Sanctions.

The motion itself was entitled:

> Motion to Prohibit Ex Parte Communications and Communications Without Authorization, *To Recover Unnecessary Costs Incurred By Plaintiffs' Counsel Due To The Actions Of Defense Counsel,* And Scheduling Order. (R. 20)

The Prayer for Relief in said Motion reads as follows:

> WHEREFORE, Plaintiffs respectfully pray that *the Defendant's Answer be stricken,* that counsel for the Defendant list all physicians, medical care providers, nurses, or health care

> providers of the Plaintiffs with whom he has spoken, together with the date and times or each said contact and the substance of said communications, *that counsel for the Defendant be required to pay the actual cost for depositions of Dr. C.E. Ransom, Dr. James Golleher, and Nurse Lavelle Slaton, together with the Plaintiffs' attorney's fees and time incurred for having to use formal discovery in lieu of informal meetings;* that Nurse Slaton be produced for a supplemental deposition *at the Defendant's expense* to answer questions she was improperly prohibited from answering; that the Plaintiffs be allowed to preserve their right to prohibit the Defendant from calling any such witnesses with whom he has spoken outside the presence of the Plaintiffs' counsel, or without the consent and authorization from the Plaintiffs, that this Court order the Defendant to forthwith tender names of his expert witnesses so they can be deposed, *and for any other relief deemed necessary and equitable by this Honorable Court.* (R. 22-23)

The "relief sought" in the Brief in Support of said Motion clearly seeks monetary sanctions and penalties against the Petitioner for unethical conduct. As the Eighth Circuit's Opinion states, Petitioner's Response to the Motion acknowledges that the "Plaintiffs are pursuing sanctions in the case at bar . . . (Appendix at 11A). The sanctions requested include a request that the Defendant's Answer be *stricken* and that money sanctions be imposed.

The Respondents' Motion was originally filed on November 14, 1991. The District Court's Memorandum Opinion was not

issued until January 29, 1992. The Petitioner thus had seventy-six (76) days within which to submit Affidavits, take depositions, or otherwise supplement the record in any way possible to establish that the Respondents were not entitled to the relief requested. The Respondents attached excerpts from four depositions, indicating improper and unethical contacts with at least seven medical/health care providers, and two Affidavits reiterating and reinforcing said improper contacts, along with statements, invoices, etc. documenting the unnecessary time and expense Respondents' counsel had incurred due to the actions of Petitioner.

In the face of uncontroverted testimony through depositions and Affidavits, and the severe sanctions requested by the Respondents, Petitioner neglected to submit one Affidavit, an excerpt from one deposition, or to request that additional or supplemental depositions be taken in support of his position that sanctions were not warranted. Neither did Petitioner request an evidentiary hearing of any kind or nature during this seventh-six (76) day period to present any of the evidence he now claims he could have presented if provided the opportunity. The opportunity was there, and any evidence Petitioner had to disprove the sworn testimony submitted by the Respondents should have been presented in a timely manner for consideration by the District Court.

The Respondents state that no such evidence exists, and the attempts by Petitioner to state that said evidence was out there, but that somehow during the 76 days available to him he was prohibited from presenting same, is simply untrue. (Petition, p. 13, fn. 9). If he could have explained Dr. Golleher's sworn testimony, why did he not explain same during Dr. Golleher's deposition? He was present during said deposition. Why did he not submit an Affidavit from Dr. Golleher, or request a supplemental deposition to explain the "discrepancy" he contends exists? Why did he not request a supplemental deposition for Dr. McAdams to explain that

he was not attempting to persuade him not to testify in these proceedings when such intention is clearly evident from his Affidavit? If he could have "subpoenaed another attorney from another firm who was present at the meeting with Dr. McAdams to testify that there was no instruction or insinuation to the witness that he should not testify," why did he not submit an Affidavit from this Attorney? Why did he not submit a Motion for Reconsideration, supported by this "evidence," and request a hearing?

The Petitioner had amply time to complete the record in these proceedings. The factual evidence presented is uncontroverted, thus there was no need for an evidentiary hearing. If the Petitioner had wanted an evidentiary hearing, he should have requested it. He knew sanctions of the severest nature were requested, and had notice of the evidence presented which supported same.

B. The Court Made A Specific Finding Of Bad Faith.

Petitioner contends that there must be a specific finding of "bad faith" on the part of the lower Court, and that absent same monetary sanctions cannot stand. As the lower Court held, the exact words "bad faith" need not be used. The record as a whole is viewed in its entirety. If said record supports a holding of bad faith, whether or not the words "bad faith" are used is irrelevant. *Baker Industries, Inc. v. Cerberus Ltd.*, 764 F.2d 204 (3rd Cir. 1985).

The District Court's Opinion, quoted in pertinent parts, reads as follows:

> On the other hand, the conduct of the Defendant's counsel in this case had gone beyond discourteous and crossed into the zone of *impermissible and unethical* conduct. For reasons explained more fully below, *abuses in this case justify and require sanctions.* [Appendix at 21A].

In *Manion,* the District Court emphasized the fact that there were no allegations or evidence of misconduct on the part of the defense attorney. *Regrettably, that is not true in this case.* We need look no further than the undisputed facts in this case for illustration of exactly the kind of *misconduct* to which the *Manion* Court referred. . . .

By suggesting to Dr. McAdams that he not testify, *the Defendant's lawyer has violated Model Rules of Professional Conduct* which prohibit a lawyer from obstructing another party's access to evidence or from counseling a third party to conceal information having 'possible evidentiary value' Model Rule 3.4(a). Even if the Arkansas Rules permitted *ex parte* interviews, this conduct would be *impermissible and unethical.* Defense counsel's *improper* conduct illustrates *graphically* the wisdom of the prohibition against unauthorized *ex parte* communications with a patient's treating physician. C.J. Hall is hereby sanctioned $2500.00, *an amount the Court considers paltry, in light of the conduct* . . . .

The Court has seriously considered barring these treating physicians/ defense experts from testifying at all in light of defense counsel's *blatant* refusal to acknowledge, much less comply with Rules 503 and 35 and his *improper attempts to influence testimony* . . . . [Appendix at 32A].

The implication that attorneys are bound only by those rules they like — the rules their 'side of the bar' endorsed — is *not only novel, it is astonishing.* [Appendix at 32A].

The question for the Court is the appropriate sanction. Plaintiffs have submitted a recent Order entered in a State malpractice action wherein Mr. Hall's partner was ordered to write a letter of retraction to a physician/ witness whom he had instructed not to cooperate with the Plaintiffs' lawyer. Such a remedial measure would be ineffective at this point in this lawsuit. Yet the Court cannot ignore this *serious violation of ethical rules.*

Mr. Hall is hereby sanctioned in the amount of $2500.00 for this *violation*. . . .

The Court is aware that the modest sanctions imposed against Mr. Hall will not 'unring the bell'; it is difficult for a Court to sanction *impermissible attorney conduct* without unduly penalizing the client. However, Dr. Lewis should not misinterpret the Court's leniency. The sanctions imposed are intended to serve as a *shot across the bow.* Dr. Lewis, as well as all other parties and potential parties, are cautioned that any *further misconduct by attorneys* will result in substantial sanctions which will impact heavily upon the parties they represent. [Appendix at 34A-35A].

The Eighth Circuit's Opinion reads as follows:

> Reading the Order as a whole, it is evident that the District Judge saw in Hall's conduct an intentional effort to obstruct the proper flow of relevant information in the discovery process. Although the District Judge did not use the words "oppressive, vexatious, or bad faith" to describe Hall's action, and doing so would have more easily disposed of Hall's present argument, the specific findings of impermissible and unethical conduct are sufficient to supply these meanings. Little is to be gained from requiring semantic improvement when the meaning of the District Judge is clear. [Appendix at 9A].

It is hard for Respondents to fathom a more strident finding of "bad faith" against an Attorney than the lower Court's finding, and the Eighth Circuit's adoption of, "blatant . . . impermissible and unethical" conduct. The lower Courts ruled that Petitioner did not conform to professional morals or standards. The fact that the magical words "bad faith" were not used in the Opinion is of no consequence. The District Court's finding of bad faith leaps out at anyone who reads his Opinion. A remand of the case to the District Court for insertion of the words "bad faith" would not be in the interest of judicial efficiency or economy, and would spawn the "satellite litigation" sanctions are supposed to prevent.

II.

THE DISTRICT COURT HAS THE UNQUALIFIED RIGHT TO GOVERN MEMBERS OF THE BAR WHO PRACTICE BEFORE IT, AND NEED NOT REFER ETHICAL VIOLATIONS WARRANTING SANCTIONS TO THE STATE DISCIPLINARY COMMITTEES.

The Petitioner acknowledges that the District Court has the inherent power and authority to sanction members of the Bar, yet seems to believe that his rights were somehow violated by the failure of the District Court to refer this matter to the State Committee on Professional Conduct. It is ludicrous to believe that every time an ethical violation, or any violation, occurs which mandates sanctions against an Attorney practicing in federal Court same must be referred to the State Disciplinary Committees. A practice such as this would, in effect, visciate the ability of the District Courts to control the Attorneys practicing before them, and the manner and method in which the cases being litigated before them proceed. Such is not the law.

The Respondents quote from *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 392-394 (1st Cir. 1990) which cited *O'Connell v. Champ International Corp.*, 812 F.2d 393 (8th Cir. 1987), to exemplify the right of the District Court to make findings of fact, the sanctity to which the appellate Courts hold said findings of fact, and the scope of sanctions available to District Courts to police members of the Bar practicing before them.

> If the District Court's account of the evidence is plausible in light of the record viewed in its entirety, the Court of Appeals may not reverse it even though convinced that had it been sitting as the tryer of fact, it would have weighed the evidence differently. When there

are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. . . .

It is axionic that, absent an abuse of discretion, we will not disturb a District Court's choice of sanctions . . . This differential standard applies to sanctions in the discovery milieu. . . . It also applies under Rule 11. . . . Because the imposition of sanctions is peculiarly within the province of the Court in which the challenged conduct occurs, a party complaining to an Appellate Tribunal in respect to trial-level sanctions 'bears a heavy burden of demonstrating that the Trial Judge was clearly not justified in entering the Order.' (Case cited)

The rule is anchored in common sense. 'District Judges live in the trenches . . . [and] . . . are, by and large, in a far better position than Appellate Tribunals to determine the presence of misconduct and to prescribe concinnous remedies.' (Cases cited discussing discovery misconduct and sanctions) As this situation aptly illustrates, decisions as to whether sanctions should be imposed, and if so, what form they should take, often require intensive inquiry into the circumstances surrounding an alleged violation. The Trial Judge, steeped in the facts and sensitive to the interplay amongst the protagonists, is ideally equipped to review those ramifications and render an informed judgment . . . After all, the imposition of sanctions is essentially a judgment call, and as such, seems best left to

> the judicial officer most familiar with the case, the parties, and the attorneys. (Citing *O'Connell v. Champ International Corp.*, 812 F.2d 393, 395 (8th Cir. 1987). Accordingly, we treat the District Court's recommendations on sanctions in this case as we would treat a sanctions Order, reviewable only for abuse of discretion.

Several cases cited by Petitioner in the case at bar actually exemplify the Plaintiffs' point. *Chambers v. Nasco, Inc.*, 111 S. Ct. 2123 (1991) upholds the right of District Courts to act *sua sponte* in imposing sanctions. In *Chambers*, a party was sanctioned $1,000,000.00, and the Supreme Court held that the District Courts may turn to their inherent powers to fashion and tailor a sanction to prohibit abuses at all stages of the litigation. If one of the specific Federal Rules is not broad enough, the District Court is free to use the inherent power it possesses in any way plausible. It does not matter that a specific Rule could have been cited, or relied upon, to sanction sone of the sanctionable conduct. Said rules need not be cited, nor relied upon, when the Court is relying upon its inherent powers. *Id.* at 2126.

Zambrano v. City of Tustin, 885 F.2d 1473 (9th Cir. 1989) is unjustifiably relied upon by Petitioner. In *Zambrano*, an Attorney had *negligently* failed to join the local bar of a District Court in the State of California and was sanctioned for "abusive litigation" when he appeared in said Court to represent his client. The record clearly indicated that the failure of the Attorney to become licensed in the local Court was merely an oversight. Petitioner is guilty of much more than an oversight in the case at bar.

Zambrano does discuss the inherent powers of the federal Courts to discipline members of those who practice before it "from strict functional necessity." *Id.* at 1478. It held that Attorneys

should not have financial sanctions imposed against them for negligent violations of the local Rules, mistakes, or inadvertent errors of judgment. However, even *Zambrano,* disallowing sanctions under the facts presented before it, states:

> We do not suggest that under other circumstances lawyers who fail to apply for membership in the District Court bar will be immune from sanctions. Willful or reckless disregard of Court Rules justifies punitive actions . . .

Id. at 1484.

MMR/Wallace Power & Industrial, Inc. v. Thames Assoc., 764 F. Supp. 712 (D.C. Conn. 1991), cited by Petitioners involved a situation where the Attorneys for a party were disqualified for improper and unethical *ex parte* contacts. The Attorneys argued, as Petitioner has in the case at bar, that "no confidential information" changed hands. The Court held that the actions of the Attorneys were expressly prohibited by specific ethical rules, and that the Court would *presume* that confidential information changed hands in the light of such conduct. The Court ruled that the "spirit of the ethical norms adhered to in this District, if not the letter of the rules of professional conduct themselves," had been violated. *Id.* at 718.

In the case at bar, specific ethical rules clearly prohibit Mr. Hall from attempting to persuade or encourage, directly or *indirectly,* witnesses with relevant information from freely discussing same with the Plaintiffs' Attorney. Furthermore, even though he was not monetarily sanctioned for same, the District Court found clear violations of the rules against unauthorized *ex parte* contacts with treating physicians. Petitioner claims no confidential communications took place. This fact is irrelevant, even if true, but we should not be left to wonder or guess.

Finally, *In Re: Snyder,* 472 U.S. 634 (1984), upholds the power and the ability of the Federal Courts and the judicial system to sanction Attorneys when necessary.

> Federal courts admit and suspend attorneys as an exercise of their inherent power; the standards imposed are a matter of Federal law.

Snyder at 636. It is simply an untenable position to state that the District Courts should not sanction or discipline the Attorneys practicing before them, and argue that any such conduct warranting same should be sent to the State Disciplinary Committees.

III.

WHETHER OR NOT THE DISTRICT COURT MADE A FINDING OF "BAD FAITH" IS TO BE GLEANED FROM THE ENTIRE RECORD, NOT WHETHER OR NOT THE WORDS "BAD FAITH" ARE ACTUALLY CONTAINED IN THE OPINION.

Petitioner states repeatedly in the Petition that the District Court made no specific finding of "bad faith," and that the monetary sanctions must therefore fail. From their review of the cases, Respondents are not sure that such is the law. However, if for purposes of argument we assume a finding of bad faith is a prerequisite in all instances to monetary sanctions, Petitioner's position is still without merit.

Baker Industries, Inc. v. Cerberus Ltd., 764 F.2d 204 (3rd Cir. 1985), cited by Petitioner involved a situation where sanctions were levied against an Attorney under 28 U.S.C. § 1927. The Court held the there must be a finding of willful bad faith before said sanctions would stand. Even though the magic words "bad faith"

were not contained in the Opinion, the appellate Court held that the record supported the implicit finding of the requisite bad faith from a review of same.

> Having established that attorneys' fees may be imposed only upon a finding of willful bad faith, we now turn to whether such a finding must be explicitly made by the District Court, and if not, whether the record here will support such an implicit finding. While the Court here did not make an explicit bad faith finding in so many words, in light of the entire record and *the expression of the District Court Judge, . . .* we are satisfied that the 'bad faith' standard that we hold is required under § 1927, is met . . .
>
> Under these circumstances, little would be gained by remanding this proceeding to the District Court for an explicit finding of bad faith when it is clearly evident from the District Court's expressions and from the record as a whole, that the District Court found, albeit implicitly, [the attorney's] conduct to be in bad faith. . . .
>
> The District Court's finding of willfulness on [the attorney's] part, as a finding of fact, is subject to reversal only if clearly erroneous. See Fed. R. Civ. p. 52(a). This standard requires us to pay deference to the District Court's interpretation of the factual record before it. *Anderson v. City of Bessemer City, N.C.*, __ U.S. __, 105 S.Ct. 1504, 84 L.Ed. 2d 518 (1985).

Baker at 209-210.

For the reason spelled out in Section I B, it is evident from a review of the entire record that bad faith, if truly a prerequisite to the imposition of monetary standards, was present. The argument the Petitioner was sanctioned on the basis of one sentence in an Affidavit and a single statement in a deposition is misleading. While the District Court specifically referred to the Affidavit of Dr. McAdams and an excerpt from Dr. Golleher's deposition in support of the sanctions, it is clear from a review of the Opinion he looked at the entire record, and took the totality of Petitioner's "unethical and impermissible" conduct into account.

In *Magnus Electronics, Inc. v. Masco Corp. of Indiana,* 871 F.2d 626 (7th Cir. 1989), Attorneys were sanctioned for failing to cooperate in discovery, and for having improper *ex parte* communications with a magistrate in violation of specific ethical rules of conduct, a situation analogous to that presented in the case at bar. A review of the Opinion does not indicate the magical words "bad faith" were expressly put in the District Court's Opinion; however, the appellate Court upheld the sanctions holding that:

> The District Court may find willfulness, or bad faith, in the manner in which the attorney conducts the litigation.

Id. at 632.

Even *Roadway Express, Inc. v. Piper,* 447 U.S. 752 (1980) upon which Petitioner heavily relies, does not indicate that the specific words "bad faith" must be found in any Opinion or order to uphold monetary sanctions. In fact, the United States Supreme Court's Opinion in *Roadway* is to the contrary. This Court held in *Roadway* that the conduct supporting sanctions need only be adjudged as *tantamount to* bad faith . . . *Id.* at 767.

Roadway was remanded to the lower Court for such a finding.

In the case at bar, it is obvious from a review of the Opinion that the District Court held Petitioner's conduct was "tantamount to" bad faith. His conduct was found to be "ethical and impermissible" and a "blatant refusal to acknowledge, much less comply with" the applicable Rules of Civil Procedure, Rules of Evidence, and Rules of Professional Conduct. The Attorney's actions, and his position, were found to be "not only novel, [but] astonishing." The Court found Petitioner's conduct to be a "serious violation of ethical rules." Bad faith is present, and was found by the District Court. There is no reason to remand this matter for the insertion of specific words. Substance prevails over form, and the substance is self-evident.

IV.

THE PETITIONER HAD AMPLE OPPORTUNITY TO PRESENT HIS CASE TO THE DISTRICT COURT, AND AN OPPORTUNITY TO BE HEARD; THUS, DUE PROCESS WAS SATISFIED.

Petitioner takes the position that he was not on notice that sanctions, monetary or otherwise, were sought against him. A review of the record belies this position, as indicated in Section I A. The Respondents requested, in the first place, that the Petitioner's client's *Answer be Stricken,* and then, alternatively, a variety of sanctions, including Attorney's fees and costs. Numerous Affidavits and depositions were submitted as a part of the well-documented record before the District Court, and, even though only two were directly *quoted* by the District Court, all were *considered* by the Court and referred to at numerous times in his Opinion. Petitioner submitted *no* Affidavits or excerpts from depositions, did not request additional time to take depositions or submit Affidavits, and never requested an evidentiary hearing in the face of a request for the most serious of sanctions. Thus, the factual evidence before the Court, as the Court so found, was

uncontroverted and uncontested. (Appendix at 31a). When there is not a contested factual issue, no hearing is required. *Hill v. Norfolk & Western Railway Co.*, 814 F.2d 1192 (7th Cir. 1987). The existence of a factual controversy is to be gleaned from the sworn testimony itself not from unsupported arguments by Attorneys in their Briefs trying to manipulate said sworn testimony.

Eash v. Riggins Trucking Co., 757 F.2d 557 (3rd Cir. 1985), cited by Petitioner, upholds the right of the District Court to impose sanctions on any Attorney for Attorney misconduct. The sanctions can be based on the District Court's inherent power, any local rule, and Federal Rule of Civil Procedure 83. The specific sanctions in *Eash* were vacated, but the law supports the position of the Respondents.

In *Eash*, an Attorney was sanctioned for settling a case on the day of trial. There was no violation of any kind of any ethical rule, local rule, or any Federal Rule of Civil Procedure. In fact, the appellate Court notes that cases are settled on the day of trial many times. The undersigned's own experience can attest to this fact. Accordingly, sanctions were vacated by the appellate Court. However, in the case at bar, we have a direct violation of the ethical rules of conduct for Attorneys, and a violation of Rules applicable to Attorneys handling medical malpractice cases, of which Petitioner is intimately familiar.

The Court in *Eash* upheld the right of the District Court to issue monetary sanctions, although same are not expressly recognized by local rules, as being fully within the Court's inherent powers. *Eash* also provides us with a discussion beneficial to discerning the scope of "due process" mandated before sanctions can be levied. The Court makes note of the fact that an Attorney must have "an *opportunity* to be heard" prior to the imposition of sanctions. *Id.* at 570. However, the scope and manner followed to ensure due process is flexible, and *tailored* to fit each individual case.

> The form which those procedural protections must take is determined by an evaluation of all the circumstances and an accommodation of competing interests. . . . Courts of Appeals may not impose disciplinary sanctions on attorneys until 'after reasonable notice and an opportunity to show cause to the contrary, and after a hearing, *if requested.*' . . . We believe that as a general practice a monetary detriment should not be imposed by a Court without prior notice and *some occasion to respond* . . . In some cases, it may be that the record developed at the time of the alleged misconduct will, itself, satisfy this need as long *as the attorney has been afforded an opportunity to adduce the relevant facts.* (emphasis added)

Id. at 570-571.

The Court also makes note of the fact that whether or not "a statute, Federal rule, *ethical canon,* local rule or custom . . ." has been violated, or the absence of an "ethical canon" which would put the Attorney on notice that his conduct was improper, would have an effect on the amount of due process necessary. *Id.* at 571. In the case at bar, Petitioner violated a codified ethical rule. He offered nothing by way of sworn testimony to rebut the sworn testimony presented by Respondents. He had two and one half months to request a hearing or supply same. He had every opportunity to be heard.

Hill v. Norfolk & Western Railway Co., 814 F.2d 1192, 1201-1202 (7th Cir. 1987) held that "the right to a hearing, whether that right is implicit or explicit, is limited to cases where a hearing would assist the Court in its decision.

> . . . [Where the questioned conduct is contained in] Briefs in this Court, there are no issues that a hearing could illuminate, all the relevant 'conduct' is laid out in the Briefs themselves; neither the mental state or the attorney nor any other factual issue is pertinent to the imposition of sanctions for such conduct. Where a hearing would be pointless it is not required; hence, if there are no contested factual issues the District Judge can proceed summarily.

Petitioner had the right to raise a factual issue by submitting sworn Affidavits, or sworn testimony, to contradict the sworn testimony attached to the Respondents' Motion. He failed to do so. The import of the sworn testimony submitted by the Respondents is self evident. The District Court's finding of fact in this regard is not to be disturbed unless clearly erroneous.

Petitioner relies heavily upon *Jensen v. Federal Land Bank of Omaha,* 882 F.2d 340 (8th Cir. 1989) in support of his position that he had to receive an evidentiary hearing prior to the imposition of sanctions. In *Jensen,* a Bankruptcy Judge vigorously questioned an Attorney at the conclusion of the evidence presented at a hearing on the feasibility and plausibility of a reorganization plan. The Bankruptcy Judge did not feel the plan was feasible, threatened to have said Attorney shackled in leg irons and sanctioned the Attorney *on the spot.* The appellate Court found that the Attorney was entitled to notice and a hearing before the sanctions were imposed. Of special significance to the appellate Court was the fact that:

> The Court *sua sponte* imposed sanctions against Jensen personally in the form of FLB's attorney's fees and *denied Jensen's request for a hearing on the issue.* (emphasis added)

The appellate Court held that a hearing was required under these facts, and vacated the sanctions, but directed one's attention to *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600 (1st Cir. 1988), cited *supra*, as a comparative situation *where a full hearing was not required.* As indicated, *supra*, a full hearing is not required when an Attorney has been given notice sanctions are being considered and an opportunity to present arguments in Briefs. *See Jensen* at 342. Furthermore, the Eighth Circuit in *Jensen* stated: "We believe that the Ninth Circuit's reasoning is persuasive and we adopts its holding." *Id.* at 341. The Ninth Circuit case of *Kraszewski v. State Farm General Insurance Co.*, 130 F.R.D. 111, 114 (N.D. Cal. 1984) held as follows:

> The 9th Circuit has consistently rejected the position put forth by Defendants and their counsel that an *evidentiary* hearing must always precede the imposition of sanctions . . . *When necessary,* the District Court *may* hold an evidentiary hearing on a motion for sanctions. In this circuit and others, the dictates of due process are satisfied where the sanctioned party has a real and full opportunity to explain his questionable conduct before sanctions are imposed. (emphasis the *Court's*)

See also, Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600 (5th Cir. 1988); *Wielgos v. Commonwealth Edison Co.*, 127 F.R.D. 135 (N.D. Ill. 1989); *New York State Nat. Organization for Women v. Terry*, 737 F. Supp. 1350 (S.D.N.Y. 1990); *Propst v. Greene*, 123 F.R.D. 535 (W.D. N.C. 1988).

Again, at the risk of being redundant, Petitioner knew that sanctions of the severest kind, much more severe than the imposition of the small monetary sanction levied against him, were sought by the Plaintiffs in the case at bar. He submitted no

Affidavits or excerpts from depositions in the face of a voluminous record complied by the Plaintiffs. He requested no evidentiary hearing, no additional time to respond, no additional time to seek Affidavits, and no additional time to take depositions or to supplement the depositions of those already taken and presented by the Respondents. He had ample opportunity to present his argument, ample opportunity to be heard, and ample opportunity to request a hearing if he felt same was necessary. The sworn factual testimony submitted by the Respondents is uncontroverted. Petitioner's due process rights were not violated.

Finally, Petitioner argues he did not "flout established procedures while doing that for which he was sanctioned." (Petition, p. 15). Surely, it is not mandatory that every Court issue an Order that counsel must follow the Rules of Evidence, Rules of Civil Procedure, and Rules of Professional Conduct, before sanctions can be levied for a blatant violation of same.

V.

NOT ONLY DID PETITIONER SPEAK TO THE RESPONDENTS' PAST TREATING PHYSICIANS, HE COMPOUNDED THE ERROR BY INSTRUCTING THEM, AND OTHERS, NOT TO SPEAK TO PLAINTIFFS' COUNSEL.

The Exhibits attached to the District Court pleadings already establish that Petitioner improperly spoke to individuals, outside the presence of the Respondents' counsel, in an unauthorized manner, without first presenting a medical authorization release form. The Exhibits also indicate that not only has Petitioner engaged in this improper conduct, he has instructed these witnesses, either directly or through implication, not to speak to Respondent's counsel. We have direct evidence he has used the "you may be sued next' threat to intimidate some. If the truth were

known, there are probably many more who heard this than we have discovered. Respondents' counsel was forced to take out-of-town depositions, consuming considerable time and expense, to obtain information that could have been obtained very quickly through informal conversations. In essence, Respondents' counsel was forced to take the depositions of *his clients' own treating physicians and health care personnel.*

Rule 3.4 of the Model Rules of Professional Conduct states as follows:

> A lawyer shall not unlawfully obstruct another party's access to evidence . . . . A lawyer shall not:
>
> (a) Conceal or assist another person to do any such act.
>
> (f) Request a person other than a client to refrain from voluntarily giving relevant information to another party. . .

In the case at bar, the crux of this matter deals with certain laboratory tests that were run for congenital hypothyroidism on a child born at Central Arkansas Hospital in September, 1987. The lab director at the time in question, Dr. Jim Golleher, agreed to speak to Respondents' counsel informally. Petitioner then directed him not to speak to Respondents' counsel, and told him that he was susceptible to being sued by the Respondents. Respondents' counsel had to take his deposition.

Numerous other uncontroverted examples were before the lower Courts. The record documented unauthorized contacts of five treating physicians, and at least two other health care providers. Accordingly, it is evident Mr. Hall was not sanctioned

for a violation of Arkansas Rule of Evidence 503, else the sanctions would have been much greater.

In no pleading/opinion, etc. previously rendered, has any party, or lower Court, quoted from Dr. Golleher's deposition in such a manner as to place same in proper context.

Here is the quotation from Dr. Golleher's sworn testimony exemplifying why sanctions were levied, and putting into context what the District Court found worthy of sanctions:

Page 5, Line 23:

> Q. Do you recall me indicating during that (telephone) conversation that I could possibly come over at noon or when we had a break in depos. And you said that would be fine, but just to call and make sure you were available before I came?
>
> A. That's right. I do remember that.
>
> Q. And about 5 minutes later did you call the hospital looking for or seeking to speak to Mr. Hall?
>
> A. Yes, I did call him.
>
> Q. Were you aware that I was the one that answered the phone?
>
> A. No. I didn't know that, but I did call Mr.. Hall.
>
> Q. Were — did you know that in that

conference room when you were talking to Mr. Hall that you were talking on one of those phones where your voice could be heard to the people in the room?

A. No. I had no way of knowing that.

Q. Okay. And were you aware that I was in the room and there was a court reporter in the room at that time?

A. Not at that time until after the fact.

Q. *And during that conversation you told Mr. Hall that I had requested to speak to you informally and you had no objection to that. You told him that, didn't you?*

A. *Yes.*

Q. *And Mr. Hall at that time indicated that he did have an objection to you speaking to me informally, didn't he?*

A. *If I remember right.*

Respondents do not know how they could advocate their position on the issue any better than by quoting from Dr. Golleher's own sworn testimony.

Finally, and most distressing to the Respondents, is the Affidavit from Dr. Edward McAdams, the infant's acute care treating pediatrician. The minor child depends on Dr. McAdams for her health and life. She is prone to emergency, life-threatening crises because of her condition. This Affidavit indicates that

Petitioner met with Dr. McAdams with no written authorization, no knowledge on the part of the Respondents or their counsel, and effectively tried to get him to "remain on the sidelines" so that nothing would come of this matter. These actions cannot be condoned.

Petitioner attempts to argue a certain innocence should be attached to this Affidavit, and that no harm was intended.. (a) In the first place, Petitioner should not have been there at all; (b) in the second place, what possible reason, other than to dissuade Dr. McAdams from testifying, could Petitioner have had for making such a comment after the lawsuit was filed to a witness that would undeniably have to be called to testify; (c) in the third place, the words speak for themselves, directly, circumstantially, and by implication, and, (d) finally, if the words needed a clarification, Petitioner could have supplied same prior to the Court's ruling, seventy-six (76) days later.

CONCLUSION

There is no need for this Honorable Court to review these proceedings. District Courts have the inherent power, and the obligation, to control the actions of the attorneys who practice before them, and to make sure that said conduct remains within the parameters of the applicable ethical rules and guidelines. More importantly, there is no split between the Districts regarding the right of a District Court Judge to sanction an attorney for "impermissible and unethical" conduct, constituting a "blatant" disregard for the aforementioned rules all attorneys are sworn to uphold.

For the reasons spelled out hereinabove, Respondents respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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